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No. 280

In the Supreme Court of the United States

October Term, 1936.

GEORGE W. TABER, TREASURER OF PAYNE COUNTY, OKLAHOMA, *Petitioner,*

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Respondent.*

BRIEF OF RESPONDENT.

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DONALD PRENTICE,
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BRIEF *of* RESPONDENT.

Respondent adopts its brief in opposition to petition for writ of *certiorari,* as herein supplemented, as its answer brief to the petitioner's brief on the merits.

ARGUMENT.

As we understand them, the petitioner's contentions are *(1)* that the decisions of this court referred to in his brief establish the rule that the immunity of a federal instrumentality from state taxation cannot under any circumstances be extended to personal property used by the instrumental-

ity in its operations regardless of the nature of the instrumentality, the mode of its constitution, or of the fact that it was created and controlled by the federal government exclusively to enable it to perform a governmental function, and *(2)* that the tax sought to be imposed in this case is too remote and indirect to be deemed a burden upon the instrumentality, or upon the exercise of the functions of government.

In answer to these contentions we submit—

Point One.

The application of the doctrine of implied immunity of a federal instrumentality from state taxation should have regard to the circumstances disclosed, and while in one aspect the extent of the exemption depends upon the effect of the tax, still the nature of the instrumentality and the mode of its constitution may not be disregarded, for it may be of such a character that any taxation of it would impose a direct burden upon the functions of government.

—*Metcalf* v. *Mitchell,* 269 U. S. 514;
Union Pac. R. R. Co. v. *Peniston,* 18 Wall. (85 U. S.) 5;
Safe Deposit and T. Co. v. *Virginia,* 280 U. S. 83;
Wright v. *Nagle,* 101 U. S. 791.

Comment:

In the case of *Metcalf* v. *Mitchell,* 269 U. S. 514, it was said:

> "While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not

be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be of such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

"It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function *(Gillespie* v. *Oklahoma, supra)* is prohibited."

The petitioner refers to the case of *Union Pac. R. R. Co.* v. *Peniston,* and suggests that the contrary rule announced therein to the effect that the exemption of federal agencies from state taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but solely upon the effect of the tax, is controlling in the case at bar.

The general statements in that opinion which conflict with the conclusions reached in the later case of *Metcalf* v. *Mitchell* must be limited and confined to the precise situation there under consideration *(Safe Deposit and T. Co.* v. *Virginia,* 280 U. S. 83).

The *Peniston* case was decided in the year of 1873, and the opinion clearly shows that the court in announcing its views did not consider an instrumentality created and controlled by the government to produce oil and gas from restricted Indian lands. In fact, so far as we have been able to discover, that decision was rendered many years before the government undertook to secure the development of re-

stricted Indian lands for oil and gas by creating governmental instrumentalities for that purpose. That decision should not be extended beyond the question actually under consideration for any purpose of authority in another and different case. (*Wright* v. *Nagle,* 101 U. S. 791.) Accordingly, it has no application to the case at bar.

Such instrumentalities were fully considered in the case of *Metcalf* v. *Mitchell,* as the court in that opinion refers to the case of *Gillespie* v. *Oklahoma,* 257 U. S. 501, which involved the validity of a state income tax upon the net income received by a federal instrumentality from the sale of his share of the oil and gas produced from restricted Indian land. Furthermore, the opinion in the *Metcalf* case clearly shows that it also fully considered the *Peniston* case as it is referred to therein and distinguished from the *Gillespie* case. We think it is evident that the case of *Metcalf* v. *Mitchell* is controlling in this case, as the court did not apply the rule announced in the *Peniston* case when it was considered in connection with a governmental instrumentality created and controlled by the government to enable it to produce oil and gas from restricted Indian land.

Point Two.

An agency created and controlled by the federal government to enable it to develop restricted Indian land for oil and gas is of such a character and so intimately connected with the performance of the functions of government that it is immune from state taxation and the immunity extends to the property used in its operations.

—*Metcalf* v. *Mitchell,* 269 U. S. 514;
Gillespie v. *Oklahoma,* 257 U. S. 501;

Choctaw O. & G. R. Company v. *Harrison*, 235 U. S. 292;

Jaybird Mining Company v. *Weir*, 271 U. S. 609;

Indian Territory Illuminating Oil Company v. *Oklahoma*, 240 U. S. 522;

Large Oil Company v. *Howard*, 248 U. S. 549;

Howard v. *Gypsy Oil Company*, 247 U. S. 503.

COMMENT:

While it was said in the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, that it was not possible to state in terms of universal application just what instrumentalities of one government are exempt from taxation by the other, the court in that case announced certain rules to be used in determining the question of tax exemption and classified the instrumentalities involved in the cases referred to in that opinion in accordance with those rules. In that case the court classified an agency created and controlled by the federal government to develop restricted Indian land for oil and gas as not being subject to any taxation by the states, as it was said in the opinion that those agencies through which either government immediately and directly exercises its sovereign powers are so intimately connected with the necessary functions of government that they are immune from the taxing powers of the other, and that

"when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it *(Pollock* v. *Farmers' Loan & T. Co.* and *Gillespie* v. *Oklahoma, supra)* and forbids an occupation tax imposed on its use *(Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; and see *Dobbins* v. *Erie County, supra).*",

and also that

> "any taxation by one government of * * * an agency created and controlled by the other, exclusively to enable it to perform a governmental function *(Gillespie* v. *Oklahoma, supra)* is prohibited."

The governmental agency involved in the case of *Gillespie* v. *Oklahoma,* 257 U. S. 501, which was referred to in the *Metcalf* case and classified as being immune from the taxing power of the states was created and controlled by the federal gocernment to enable it to develop restricted Indian land for oil and gas, and as we endeavored to point out in our original brief, the nature of that agency and its mode of constitution and the purpose for which it was created by the government is identical with the agency in this case.

The only difference between the *Gillespie* case and this case is in the character of the property of the agent sought to be taxed. In a number of cases involving identical or similar governmental agencies the State of Oklahoma heretofore attempted to tax *(a)* leases covering restricted Indian land *(Indian Territory Illuminating Oil Company* v. *Oklahoma,* 240 U. S. 522); *(b)* the gross receipts from the total production of coal produced from Indian land *(Choctaw O. & G. R. Company* v. *Harrison,* 235 U. S. 292); *(c)* the gross value of the production of oil and gas less the Indians' royalty interest under leases made for the benefit of the Indians *(Large Oil Company* v. *Howard,* 248 U. S. 549; *Howard* v. *Gypsy Oil Company,* 247 U. S. 503); *(d)* the net income derived by lessee from the sale of his share of oil and gas produced from leases covering restricted Indian land *(Gillespie* v. *Oklahoma,* 257 U. S. 501); and *(e)* on an ad valorem basis

ore in the possession of a lessee produced from restricted Indian land under a departmental lease (*Jaybird Mining Company* v. *Weir*, 271 U. S. 609).

In each of those cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians, and not because of the character of the property sought to be taxed. (*Jaybird Mining Company* v. *Weir*, 271 U. S. 609.)

The property sought to be taxed in the cases of *Indian Territory Illuminating Oil Company* v. *Oklahoma, Choctaw, O. & G. R. Company* v. *Harrison, Large Oil Company* v. *Howard*, and *Howard* v. *Gypsy Oil Company* was different than the property involved in the *Gillespie* case. All of those cases were referred to and discussed in the *Gillespie* case, and doubtless were considered by the court in the *Metcalf* case, wherein the agency in the *Gillespie* case was classified as being immune from taxation not because of the character of the property sought to be taxed, but because it was an agency created and controlled by the government exclusively to enable it to perform a governmental function.

We submit it is clear that when the *Metcalf* case is considered in connection with the other cases above referred to that federal agencies of the character involved in those cases and in this case are immune from the taxing power of the states, and that the immunity is absolute and extends not only to the instrumentalities and to the oil and gas produced and the income derived from it, but also to the personal property used by the agency to enable it to perform its governmental function to produce oil and gas from restricted Indian land.

Point Three.

The ad valorem tax sought to be levied by the State of Oklahoma upon the equipment used by respondent in its operations as an instrumentality created and controlled by the federal government to produce oil and gas from restricted Indian land would impose a direct burden upon the functions of government.

—*Metcalf* v. *Mitchell*, 269 U. S. 514;
Burnet v. *Jergens Trust*, 288 U. S. 508;
Large Oil Company v. *Howard*, 248 U. S. 549;
Howard v. *Gypsy Oil Company*, 247 U. S. 503.

Comment:

When the effect of the tax sought to be imposed by the State of Oklahoma upon the equipment used by respondent is considered, the necessity for the rule announced in the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, to the effect that such instrumentalities are immune from the taxing power of the states because they are of such a character and so intimately connected with the exercise of a power and the performance of duty by the government, becomes apparent.

The federal government acting as trustee of an express trust (*Burnet* v. *Jergens Trust*, 288 U. S. 508) leased restricted Pawnee Indian land to respondent in order to secure the development thereof for oil and gas for the benefit of the Indian owners.

The government required respondent under the terms of the lease to *(a)* develop the land under the direct supervision of the Secretary of the Interior (Lease, Section 8, R. 35); *(b)* pay to the United States officer having jurisdiction of the leased premises for the benefit of the Indian owners

the sum of 12½% of the gross proceeds of all crude oil extracted from the land, and a certain designated sum as royalty on each gas producing well (Lease, Section 2, R. 31); *(c)* furnish the Indian owners free gas for domestic purposes, provided surplus gas was produced from the premises (Lease, Section 2, R. 32); *(d)* grant a lien on all improvements, tools, machinery, and all other personal chattels used in operating the leasehold, as security for the payment of the royalty (Lease, Section 6, R. 35); and *(e)* agree that any buildings or permanent improvements erected on the leasehold by it should become the property of the Indian owners (Lease, Section 5, R. 34).

Thus it will be seen that the equipment sought to be taxed in this case is not used by the respondent exclusively for its own benefit and solely for its own profit, but is also used for the benefit of the Indian wards of the government and so they may receive an income from the oil and gas underlying their land. It is used by the respondent under the supervision of the government to enable it to perform a governmental function.

If the State of Oklahoma has the power to impose an ad valorem tax on the equipment used by a federal instrumentality to produce oil and gas from restricted Indian land, it has the power to sell the same if the tax is not paid. It is obvious that the right to operate a restricted Indian oil and gas leasehold could not, by virtue of the state's taxing powers, be transferred from the instrumentality to the purchaser of the equipment at a tax sale. Such purchaser would have no right or authority to leave the property on the restricted Indian land, or use it to operate the wells, and would be required to pull the casing from the wells, dismantle the

derricks, and remove the equipment from the leasehold. This would result in direct interference with the functions of government itself as it would destroy the lien on the equipment and ruin the producing wells, thereby defeating the purpose of the government to provide a royalty income for its Indian wards, and depriving the instrumentality of the power to serve the government as it was intended to serve it.

Each day's operation of an oil well depletes the oil in the underground reservoir from which it is being produced. The amount of the production gradually declines until the well is not capable of producing sufficient oil to provide a profit over and above the costs of operation, thus forcing the operator to plug and abandon the well. Hence, an ad valorem tax by the State of Oklahoma on the equipment used by respondent would directly interfere with the functions of government as it would increase the cost of operation and force respondent to abandon the wells when the amount of the tax equals the amount of the profits received by respondent from the sale of its share of the oil produced. The amount of the tax involved in this case is approximately $700.00. Sooner or later, due to decline of production, respondent's profits from the lease will not exceed that sum. Thus, while the lease would be capable of producing annually, oil of the value of approximately $700.00, and the Indian wards of the government would be entitled to receive as royalty 12½% thereof, respondent would be unable to operate at a profit solely because of the tax. It certainly could not be expected to operate the lease at a loss in order to pay the Indians the royalty and the state the tax. It is evident, therefore, that the tax would

impose a direct burden upon the functions of government by depriving the Indians of their royalty income and forcing the respondent to abandon the wells at an earlier date than would otherwise be necessary.

The power of the State of Oklahoma to tax the net income received by a federal instrumentality from the sale of its share of oil and gas produced from restricted Indian land *(Gillespie* v. *Oklahoma),* or to impose a tax upon the gross value of the production of oil and gas, less the Indians' royalty interest *(Large Oil Company* v. *Howard, Howard* v. *Gypsy Oil Company),* has been denied by this court. In denying the right of the state to tax the net income, it was said by the court that "a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms that it can for its Indian wards."

It is manifest that an ad valorem tax upon the equipment used by such an instrumentality would impose a greater burden and hamper the government in a greater degree than would a tax upon the net income. A tax upon the net income does not arise at all unless a profit is shown over and above all proper development costs, expenses and losses, and the tax cannot be heavy unless the profits are large. The burden of an ad valorem tax on the lessee's equipment is more substantial and direct than a tax upon the net income. It is laid irrespective of whether the equipment is being used to produce a profit or otherwise, and may be extended to such limits that oil and gas could only be produced at an actual loss, thus forcing the instrumentality to abandon the wells to the detriment of the Indian wards of the government.

It is obvious that an ad valorem tax imposed upon the equipment would diminish the instrumentality's net income as would a tax imposed upon the net income itself. Thus, such a tax amounts in substance and fact to a tax not only upon the net income but also the gross income of the instrumentality and upon its share of the oil and gas produced, which was prohibited by this court in the *Gillespie* and *Howard* cases.

The Indian wards of the government had no interest whatever in the net income of the instrumentality sought to be taxed in the *Gillespie* case, or in the oil and gas sought to be taxed in the *Howard* cases. In this case the equipment sought to be taxed is used to produce a royalty income for the Indian wards, and it follows that any taxation thereof by the State of Oklahoma, which could result in depriving the Indians of their royalty income, or destroying their lien on the equipment, would directly hamper the United States in its efforts to secure the development of restricted Indian land for oil and gas, and is, therefore, beyond the taxing power of the state.

Point Four.

Where immunity of a federal instrumentality from state taxation exists, it is not affected by the amount of the tax, or the extent of the resulting interference, but is absolute.

Fox Film Corporation v. *Doyal,* 286 U. S. 123;

Indian Motorcycle Company v. *United States,* 283 U. S. 570;

Trinityfarm Construction Company v. *Grosjean,* 291 U. S. 466;

Metcalf v. *Mitchell,* 269 U. S. 514;
Gillespie v. *Oklahoma,* 257 U. S. 501.

COMMENT:

In the case of *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, it was said:

> "Where immunity of federal instrumentalities from state taxation and of state instrumentalities from federal taxation exists, it is absolute, resting upon an entire absence of power."

The immunity exists where a direct burden is laid upon the governmental instrumentality *(Fox Film Corporation* v. *Doyal).* It exists in this case because the instrumentality involved herein was created and has been at all times and is now controlled by the government to enable it to produce oil and gas from restricted Indian land, and is, therefore, so intimately connected with the exercise of a power and the performance of a duty by the federal government that any taaxtion of it by the state would result in direct interference with the functions of government itself *(Metcalf* v. *Mitchell* and *Gillespie* v. *Oklahoma).*

Where the doctrine applies as in this case, it does not depend upon the amount of the tax, or the extent of the resulting interference *(Indian Motorcycle Company* v. *United States)* but is absolute, and, therefore, extends to the personal property used by the respondent to produce oil and gas from restricted Indian land.

Point Five.

Agencies employed by the federal government to produce oil and gas from restricted Indian land are not subject to taxation by state authorities without congressional consent.

—*Shaw* v. *Gibson-Zahinser Oil Corporation*, 276 U. S. 575;

Jaybird Mining Company v. *Weir*, 271 U. S. 607.

Comment:

We think it apparent from the above decisions that without congressional consent no federal agency created and controlled by the government to enable it to produce oil and gas from restricted Indian land can be taxed by state authority.

Congress has authorized the State of Oklahoma to impose a gross production tax upon oil and gas produced from the Osage nation, all minerals produced from Quapaw Indian lands, and upon all minerals, including oil and gas, produced from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, which tax is in lieu of an ad valorem tax on the equipment used to produce the oil and gas, but Congress has never authorized the State of Oklahoma to impose a gross production tax upon oil and gas produced from restricted Pawnee Indian land, or an ad valorem tax upon the equipment used for that purpose. When such taxation will be permitted is a matter entirely within the discretion of Congress.

Point Six.

The decisions referred to by petitioner are not controlling in this case and do not establish the rule that the immunity of a federal instrumentality from state taxation cannot under any circumstances be extended to personal property used in its operations.

Comment:

None of the cases relied upon by petitioner involve property used by an instrumentality of the federal government to secure a royalty income for its Indian wards. A number of the cases do not involve governmental instrumentalities, and in others the property sought to be taxed was used by the agencies exclusively for their own benefit and solely for their own profit, and while they had received privileges from the government, they were not privileges to be exercised on behalf of the government, but solely on their own behalf.

In *Federal Compress Company* v. *McLean,* 291 U. S. 17, it was said that appellant's license under the Warehousing Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency of the government, and that the appellant in the enjoyment of the privilege granted, was engaged in its own behalf, not the government, in the conduct of a private business for profit. In *Susquehanna Power Company* v. *State Tax Commission,* 283 U. S. 291, it was not held that the power company was a federal instrumentality, but the court assumed, for the purpose of the opinion, that its license was an instrumentality, and held that property employed in the exercise of a privilege created by the government for private business advantage was not exempt from state taxation.

Alward v. *Johnson,* 282 U. S. 509, involved a state tax upon the gross revenue received by the owner of an automotive stage line, who transported the United States mail under contract with the government. The government had no interest whatever in the property used to transport the mail, or in the gross receipts, or the benefits derived from the performance of the contract. In that case the contract was the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, was exempt from taxation or other interference by the state. But where, as in the case at bar, the instrumentality is created and controlled by the government in order to enable it to produce minerals from restricted Indian land, it is of such a character that not only the lease, but also the lessee and the property used in its operations are the instrumentalities employed by the government for carrying into execution the powers of government, and in such a case neither the lessee's net income, nor its share of the minerals produced are subject to state taxation. *(Gillespie* case and *Howard* cases.)

In *Thomas* v. *Gay,* 169 U. S. 264, and *Wagoner* v. *Evans,* 170 U. S. 588, certain parties placed cattle on a portion of the Osage Indian reservation under the authority of a duly approved grazing lease. The Territory of Oklahoma imposed a tax on the cattle which were owned by the lessees. It is obvious that the tax did not affect the Indians as it was not imposed on the business of grazing, or on the rents received by the Indians, but solely upon the cattle in which the Indians had no interest whatever. The Indians were only interested in receiving the rentals payable under the leases, which accrued regardless of whether the lessees

placed any cattle on the land, or took advantage of the grazing privileges granted. It is clear in this case that the lessees were not performing a governmental function under the direct supervision of the government, but were exercising the privileges granted by the leases for their own advantage and not for the benefit of the government or its wards.

In *Baltimore Ship Building Company* v. *Baltimore,* 195 U. S. 375, neither the company nor the property involved therein were instrumentalities of the United States. (See *Long* v. *Rockwood,* 277 U. S. 142; overruled on other grounds, 286 U. S. 123.) Furthermore, it was held in the opinion while the rights of the government could not be extinguished by the state that as the fee was in the Ship Building Company, it could be taxed, and if necessary sold, subject to the rights of the government. It is obvious that this case is not in point as it did not involve a federal instrumentality and the equipment used by lessee of restricted Indian land could not be sold for taxes and removed from the leasehold without ruining the producing wells. The tax sale purchaser could not use the equipment to operate the lease as it is a federal instrumentality and is not subject to state taxation. *(Indian Territory Illuminating Oil Company* v. *Oklahoma,* 240 U. S. 522.) Accordingly, he could not acquire title to the lease by purchasing the equipment at a tax sale.

The case of *Choctaw, Oklahoma and Gulf Railroad Company* v. *McKey,* 256 U. S. 531, did not involve an agency which was created and controlled by the government exclusively to enable it to perform a governmental function. As was said in that case, "The most that can be said here is that, among the public served by this railroad, are some

mines leased from the Choctaw nation." In *Indian Territory Illuminating Oil Company* v. *Board of Equalization*, 288 U. S. 325, it was held that oil which had been segregated and withdrawn from restricted Indian lands as the lessee's exclusive property was for its sole advantage and could not be so identified with its operations as a governmental instrumentality to entitle it to exemption from state taxation. The equipment used to produce the oil was not involved in that case.

Respondent is not using the equipment to develop the leasehold for its sole advantage, but is using it to perform a govermental function. Its relation to the government is not that of an independent contractor. It is an instrumentality of the government and is required to develop the leasehold under the direct supervision of, and in accordance with, all the regulations now or hereafter prescribed by the Secretary of the Interior governing oil and gas operations on restricted Indian land. It is required to comply with the methods of operation specified in the regulations and by inspectors who supervise its operations on the leasehold, and cannot commence any operations thereon without first notifying the representative of the Secretary of the Interior and receiving his approval of the contemplated work.

We respectfully submit that it is very clear that a state ad valorem tax on equipment used by respondent to produce oil and gas from restricted Indian land would impose a greater burden upon the exertion of governmental powers than the taxes imposed in the cases relied upon by petitioner and those cases are not controlling in this case.

Neither the case of *Union Pac. R. R. Co.* v. *Peniston*, 85 U. S. 5, nor the other cases referred to by petitioner

establish the rule that regardless of the circumstances involved, or the nature of the instrumentalities, personal property used in its operations is always subject to state taxation. The *Peniston* case and some of the other cases referred to were considered in the case of *Metcalf* v. *Mitchell,* 269 U. S. 514, and were classified therein as being at "the other end of the scale" from the *Gillespie* case. Thus, it is apparent that the character of the instrumentalities involved in those cases and in this case are entirely different. In those cases the contracts were the means employed for carrying into execution the powers of the government, and the contracts alone, and not the contractors, were exempt from taxation by the states. In this case the agency was created and controlled by the government exclusively to enable it to perform a governmental function, and is of such a character that not only the contract, but also the agent and the property used in its operations are federal instrumentalities, and are, therefore, exempt from state taxation.

Conclusion.

We, therefore, respectfully submit that the contention of petitioner is without merit and the decision of the Supreme Court of the State of Oklahoma should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 280.—October Term, 1936.

George W. Taber, Treasurer of Payne County, Oklahoma, Petitioner, *vs.* Indian Territory Illuminating Oil Company. } On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[February 1, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The respondent, Indian Territory Illuminating Oil Company, holds an oil and gas lease covering lands of restricted Pawnee Indians. The question relates to the constitutional authority of the State of Oklahoma to tax certain property used by the respondent in its operations as lessee. The Supreme Court of Oklahoma held that the property was not taxable because the lessee was a federal instrumentality and Congress had not consented to its taxation. 177 Okla. 67. We granted certiorari. October 12, 1936.

The property is described as "one dwelling, portable, one garage, one tool house, engines, pump, water well equipment, tanks, derricks, casing, tubing, rods, pipe-lines, and one trailer truck, of the aggregate value of $15,869.23". The tax is an *ad valorem* tax for the year 1933-34. There is no allegation or finding that the tax was discriminatory, the sole contention being that the property was not subject to *ad valorem* taxation because of its use as an adjunct to the production of oil and gas from the leasehold.

Our decisions distinguish between a non-discriminatory tax upon the property of an agent of government and one which imposes a direct burden upon the exertion of governmental powers. In the former case where there is only a remote, if any, influence upon the exercise of governmental functions, we have held that a non-discriminatory *ad valorem* tax is valid, although the property is used in the operations of the governmental agency. This distinction, recognized by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, was stated and applied after full consideration in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 591, and *Railroad Com-*

pany v. *Peniston*, 18 Wall. 5, 31-36. Recent illustrations are found in *Alward* v. *Johnson*, 282 U. S. 509, 514, where the tax which was sustained was laid upon property used in operating an automotive stage line between points in California under a mail carrier's contract; and in *Tirrell* v. *Johnston*, 293 U. S. 533, where a tax known as the "gasoline road toll" was held to be payable by a rural mail carrier who delivered the mail by means of his own motor vehicle. See, also, *Thomas* v. *Gay*, 169 U. S. 264, 273; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382; *Choctaw O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 536, 537; *Willcuts* v. *Bunn*, 282 U. S. 216, 226; *Susquehanna Power Co.* v. *Texas Commission* (*No. 1*), 283 U. S. 291, 294; *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147, 153.

In *Indian Territory Illuminating Oil. Co.* v. *Board of Equalization*, 288 U. S. 325, an *ad valorem* tax upon crude oil, held by the company in its storage tanks, was sustained against the claim that the oil was exempt because in its production the taxpayer was operating as an instrumentality of the United States. There the taxpayer relied, as does the state court here, upon the ruling in *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, where an *ad valorem* tax upon ores mined under a lease of restricted Indian land and in the bins on that land was held to be invalid. But we pointed out that in the *Jaybird* case the tax "was assessed on the ores in mass; and the royalties and equitable interests of the Indians had not been paid or segregated". *Indian Territory Illuminating Oil Co.* v. *Board of Equalization, supra*, p. 327. In those circumstances the tax was regarded as an attempt to tax an agency of the federal government. Emphasizing that distinction, we said in reference to the *Indian Territory Illuminating Oil Company*: "Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no farther than was necessary for that purpose". *Id.*, p. 328.

In that view, the immunity cannot be said to extend to a nondiscriminatory *ad valorem* tax upon the property of the petitioner which is involved in the instant case. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Is is so ordered.